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IN THE

Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

Petitioners,

v.

SALOMON SMITH BARNEY INC. and SALOMON BROTHERS REALTY CORP.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURERS AND WILLIAM A. FICKLING, JR., *et al.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether private parties may obtain equitable relief against nonfiduciary parties in interest who participate in transactions described in ERISA § 406(a), 29 U.S.C. § 1106(a).

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BRIEF OF
THE AMERICAN COUNCIL OF LIFE INSURERS
AND WILLIAM A. FICKLING, JR., *et al.*,
AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS

Amici curiae the American Council of Life Insurers ("ACLI"); and William A. Fickling, Jr.; Neva L. Fickling; William A. Fickling; Claudia F. Fickling; Jane Dru Fickling; Katherine M. Wright; Katherine Darden Wright; Virginia M. Rabun; W&J Capital Company, Ltd.; J&R Capital Company, Ltd.; and Nationsbank of Georgia, N.A., as successor trustee under certain Fickling private trusts (collectively the "Fickling *amici*"), respectfully submit this brief in support of the respondents.[1]

INTEREST OF AMICI CURIAE

1. *Amicus* ACLI, based in Washington D.C., is the largest trade association in the United States representing the life insurance industry. Its members consist of 435 legal reserve life insurance companies. Together, its members account for over 73.2% of the life insurance business, as well as 46.2% of the disability and 82% of the pension insurance underwritten by life insurance companies in the country.

The ACLI's members often operate as service providers to employee benefit plans, performing many nonfiduciary functions, including custodial and recordkeeping services, and therefore fall within the statutory definition of "party in interest," ERISA § 3(14), 29 U.S.C. § 1002(14). As service

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[1] Letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

providers, the ACLI's members would be subject to equitable restitution claims if suits against nonfiduciary parties in interest were permitted under ERISA § 502(a), 29 U.S.C. § 1132(a). Accordingly, the ACLI and its members have a vital interest in assuring that ERISA is interpreted consistent with its text and legislative history.

2. The Fickling *amici* are defendants in a suit in which the Secretary of Labor ("Secretary") seeks equitable relief from them on the theory that they are parties in interest who allegedly participated in a "prohibited transaction" under ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A). The Secretary of Labor alleges that *amici* violated Section § 406(a)(1)(A) when they sold Charter Medical Corporation stock to Charter's Employee Stock Ownership Plan in February, 1990.

The district court initially granted summary judgment in favor of the Fickling *amici* on the ground that ERISA does not authorize the Secretary of Labor to sue non-fiduciary "parties in interest" for their participation, knowing or otherwise, in a prohibited transaction. The Eleventh Circuit reversed, concluding that the Fickling *amici* may be held liable under ERISA if they are found to be "parties in interest." *See Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413, 1419-22 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1030 (1999).[2] The Seventh Circuit, in the decision below, expressly disagreed with the Eleventh Circuit's decision in *Herman*. Because the Secretary's action remains pending against the

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[2] The Eleventh Circuit decision considered ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5), which governs actions brought by the Secretary of Labor, while the present case was brought by private litigants under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). This Court has recognized that the two provisions must be interpreted consistently. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993); *see also, e.g., Reich v. Compton*, 57 F.3d 270, 284 (3d Cir. 1995).

Fickling *amici* in federal district court, they have a vital interest in the outcome of this case.

STATEMENT

1. In the late 1980's respondents Salomon Smith Barney Inc. and Salomon Brothers Realty Corp. (collectively "Salomon") provided broker-dealer services to Ameritech Pension Trust ("APT" or "Trust"), which holds assets for Ameritech Corporation's employee pension plans. National Investment Services of America, Inc. ("NISA") was the investment manager to APT and, as such, was responsible for investment decisions concerning certain of APT's assets. Pet. App. 2a.

From 1987 to 1989 Salomon arranged financing for two motel chains, Motels of America, Inc. and Best Inns, Inc. In four separate transactions, those companies sold mortgage notes secured by certain motel properties to Salomon, which, in turn, sold the notes to institutional investors. As consideration for its services, Salomon received fees based on a percentage of any "net cash flow" generated by the motel properties upon maturity of the associated notes, or upon sale of the properties. Pet. App. 2a.

Salomon subsequently offered to sell its participation interest in the motel properties to APT and, after extensive negotiations among Salomon, NISA, and Ameritech, APT purchased Salomon's participation interests in the four groups of motels for approximately $20 million. In the early 1990's, however, the nationwide market for hotel and motel real property collapsed and the issuers of the participation interests purchased by APT went into bankruptcy. APT suffered a considerable loss on its investment. Pet. App. 2a.

2. APT's newly appointed trustee, petitioner Harris Trust and Savings Bank, sued Salomon in 1992, alleging claims under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, and Illinois statutory and common law. To the extent pertinent here, the ERISA claim alleged that Salomon, a "party in interest" with respect to APT, participated in a

"prohibited transaction" under ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), when it sold its participation interest in the motel groups to APT.

Salomon moved for summary judgment on the ERISA claim, asserting that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes a private cause of action only against fiduciaries who caused a Section 406(a) prohibited transaction. The district court denied summary judgment, finding that nonfiduciary parties in interest may be liable under ERISA for participating in prohibited transactions. Salomon moved for reconsideration or, in the alternative, certification for interlocutory appeal. Pet. App. 3a. The district court declined to reconsider its decision, but later certified for interlocutory review, under 28 U.S.C. § 1292(b), the question whether ERISA authorizes an action "against a nonfiduciary party in interest who participated in a transaction with a pension plan prohibited in 29 U.S.C. § 1106(a)." Pet. App. 63a.

3. The court of appeals accepted the appeal and reversed. Pet. App. 1a-13a. After reviewing the statutory language, legislative history, and this Court's cases, the Seventh Circuit concluded that ERISA § 502(a), 29 U.S.C. § 1132(a), does not provide for a cause of action by private litigants or the Secretary against nonfiduciary parties in interest.

The court of appeals first noted that ERISA § 406, 29 U.S.C. § 1106—which precludes fiduciaries from permitting a plan to engage in certain transactions with "parties in interest"—governs only the conduct of fiduciaries. That focus, the court believed, indicates that only a fiduciary can violate Section 406. Pet. App. 7a. In that regard, the court observed that Section 406 is contained within Title I, entitled "Fiduciary Responsibilities." *Ibid.* The court also noted that ERISA § 409, 29 U.S.C. § 1109, makes the fiduciary—and only the fiduciary—liable for breaches of the duties described in Title I of the statute. Pet. App. 7a. Because Section 502(a)(3), 29 U.S.C. § 1132(a)(3), provides a private cause of action only to enjoin or redress "violation[s]" of ERISA, the court concluded that Section 502(a) may not be invoked against parties who are not liable under Section 409. Pet. App. 7a.

The court of appeals further concluded that this Court's opinion in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), supported the conclusion that nonfiduciaries cannot be liable for participating in a prohibited transaction under Section 406. Pet. App. 8a. In *Mertens*, this Court reasoned that because ERISA did not explicitly provide a cause of action against nonfiduciaries for participating in a fiduciary breach under ERISA § 404, 29 U.S.C. § 1104, no such cause of action exists. 508 U.S. at 254. The Seventh Circuit held that the same logic applies to Section 406 since Section 406 simply describes another variety of fiduciary breach. Pet. App. 7a. While the court of appeals recognized that *Mertens* had indicated in dictum that parties in interest might be treated different from other nonfiduciaries, so as to subject them to equitable relief in certain circumstances, the court concluded that subsequent pronouncements from this Court cast doubt on that *Mertens* dictum. *Id.* at 11a.

Finally, the court of appeals emphasized that, in enacting ERISA, Congress developed a detailed enforcement procedure under which civil penalties are the sole enforcement mechanism for nonfiduciary parties in interest who participate in prohibited transactions with pension plans. Pet. App. 9a. Indeed, the court noted that the legislative history of ERISA demonstrates that Congress deliberately chose *not* to give enforcement authority against nonfiduciaries to private parties or to the Secretary of Labor, since Congress specifically considered imposing civil liability on parties in interest for participating in prohibited transactions, then elected not to do so. *Id.* at 11a-12a.

SUMMARY OF ARGUMENT

The plain language of ERISA § 406(a), 29 U.S.C. § 1106(a), states that a "fiduciary * * * shall not cause" a plan to engage in certain transactions with parties in interest if the fiduciary "knows or should know" that the transaction is one—involving the exchange, sale, or transfer of plan assets—that Section 406 specifically prohibits. Section 406 imposes no corresponding duties on parties in interest to refrain from participating in any of the described prohibited

transactions. Because the statutory burden is placed only on fiduciaries, it naturally follows that only fiduciaries can violate Section 406, especially since parties in interest lack the authority to cause an employee benefit plan to enter into any of the transactions prohibited by Section 406. By statutory definition, only fiduciaries can exercise discretionary authority regarding the disposition of plan assets. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

The conclusion that only a fiduciary can violate Section 406 is consistent with the fact that Section 406 is contained in Part 4 of Title I of ERISA, which generally regulates fiduciary duties. Because Section 502(a)(3) only provides a cause of action for acts or practices that violate Title I of ERISA, and since only a fiduciary can violate Section 406, nonfiduciary parties in interest are not parties that may be sued under Section 502(a)(3).

Congress intended for the Secretary of the Treasury, through the assessment of excise taxes under 26 U.S.C. § 4975, to have exclusive enforcement authority over parties in interest with respect to prohibited transactions involving tax-qualified pension plans. Congress also invested the Secretary of Labor with authority to seek civil penalties from parties in interest who participate in prohibited transactions with other employee benefit plans. ERISA § 502(i), 29 U.S.C. § 1102(i). Congress did not otherwise intend to subject nonfiduciary parties in interest to suits seeking equitable relief under Section 502(a). Instead, Congress intended to make fiduciaries liable for causing prohibited transactions through the enforcement mechanisms of Title I of ERISA, including Section 502(a)(3). Indeed, ERISA's legislative history clearly shows that Congress rejected proposed legislation that expressly provided a cause of action against nonfiduciary parties in interest participating in a prohibited transaction to make good any losses sustained by an employee benefit plan, and to pay the plan any profits realized.

To subject nonfiduciary parties in interest to liability under Section 502(a)(3) would also be contrary to the rationale of *Mertens*, in which this Court reasoned that nonfiduciaries

cannot be liable under Section 502(a) for knowingly participating in a fiduciary breach because ERISA does not expressly provide for such liability. *Mertens* also effectively precludes any argument that Section 406 prohibits *transactions* rather than *fiduciary conduct*: since nonfiduciaries are not liable for participating in transactions that result in liability for fiduciaries under ERISA § 404, 29 U.S.C. § 1104 (fiduciary standard of care), it follows that they cannot be liable for participating in transactions prohibited by Section 406, which merely describes specific varieties of breaches of fiduciary duties.

ERISA's comprehensive enforcement provisions provide no textual support for the proposition that nonfiduciary parties in interest may be subject to suit under Section 502(a)(3). Petitioners' claim that Section 502(a)(3) does not expressly limit the parties who may be sued begs the question. ERISA does not affirmatively authorize such an action, and this Court has repeatedly emphasized its unwillingness to infer causes of action in the ERISA context. *See Mertens*, 508 U.S. at 254. Moreover, the fact that ERISA § 502(a)(6), 29 U.S.C. § 1132(a)(6), provides for an express cause of action by the Secretary of Labor against parties in interest limited to recovering civil penalties commands the conclusion that the absence of an express provision was not simply legislative oversight, but instead "strong evidence that Congress did not intend to incorporate other remedies that it * * * [did not] incorporate expressly." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985). And the fact that the Secretary of Labor's express authority to impose civil penalties against parties interest under Title I of ERISA is restricted to prohibited transactions involving *welfare benefit plans*, ERISA § 502(i), 29 U.S.C. § 1102(i), with the Secretary of the Treasury having parallel authority under 26 U.S.C. § 4975 to impose penalties against parties in interest in prohibited transactions involving *pension plans*, certainly eliminates any credible claim that Section 502(a)(3) reaches parties in interest involved in a prohibited transaction with a pension plan.

Petitioners strain to rescue their position by construing the phrase "other person" in Section 502(l), 29 U.S.C. § 1132(l), as an acknowledgment of party-in-interest liability under Section 502(a). But this Court in *Mertens* expressly rejected a similar argument and suggested that the term "other person" in Section 502(l) refers to a co-fiduciary, and not to the same fiduciary party. *See* 508 U.S. at 260-61.

Finally, petitioners and their *amici* fare no better with their reliance on Section 3003, 29 U.S.C. § 1203, which requires the Secretary of Labor to report to the Secretary of the Treasury any information that a "party-in-interest * * * is violating" Section 406. That provision proves very little because fiduciaries may be parties in interest. Indeed, by requiring only that the Secretary of the Treasury be notified with no comparable obligation on the Secretary of the Treasury to notify the Secretary of Labor, Congress once again made clear its intent to leave with the Secretary of the Treasury the sole enforcement responsibility against parties in interest.

ARGUMENT

NONFIDUCIARY PARTIES IN INTEREST ARE NOT SUBJECT TO SUIT UNDER SECTION 502(a)(3) OF ERISA.

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), allows participants, beneficiaries, or fiduciaries to seek "appropriate equitable relief" to redress any act or practice that "violates" Title I of ERISA. ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5), in parallel language, gives the Secretary of Labor the right to seek equitable relief to "redress" "violation[s]" of Title I of ERISA. Neither provision, however, authorizes a suit that purports to seek equitable relief from parties who have not "violated" Title I of ERISA. Nonfiduciary parties in interest who participate in the transactions described in ERISA § 406(a), 29 U.S.C. § 1106(a), do not thereby "violate" any provision of Title I. As demonstrated below, while Section 406(a) enjoins fiduciaries from causing an employment benefit plan to enter into certain transactions

with parties in interest, it imposes no comparable duty on parties in interest to avoid participating in such a transaction. The statutory burden is placed entirely on the fiduciary. Accordingly, parties in interest are not subject to suit under Section 502(a)(3) or (a)(5).

A. Section 406 Expressly Prohibits Only Fiduciaries From Causing A Plan To Enter Into A Prohibited Transaction.

Contained in Title I of ERISA, which is entitled "Fiduciary Responsibilities," ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), states:

> Except as provided in section 1108 of this title:
>
> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> (B) lending of money or other extension of credit between the plan and a party in interest;
>
> (C) furnishing of goods, services, or facilities between the plan and a party in interest;
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
>
> (E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

Section 406 plainly provides that a "fiduciary * * * shall not cause" a plan to engage in certain transactions with parties in interest. While a party in interest may be a participant, only a fiduciary can "cause" a plan to enter into a "prohibited transaction" because only a "fiduciary" has discretionary authority over the assets of a plan. 29 U.S.C. § 1002(21)(A). A nonfiduciary party in interest obviously has no such au-

thority, and no provision of ERISA explicitly imposes any duty on parties in interest to avoid participating (knowingly or unknowingly) in such a transaction. Thus, the exclusive responsibility to avoid a prohibited transaction is placed on the shoulders of the fiduciary. And that is where civil liability for violating Section 406 rests. As the Court put the point in *Mertens*, ERISA "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." 508 U.S. at 262. In the case of prohibited transactions under Section 406(a), that actor is the fiduciary, not the party in interest.

Any other conclusion would not be in harmony with the text of Section 406. For example, the statute does not bar all transactions between an employee benefit plan and a party in interest, but only those transactions that a fiduciary "knows or should know" are prohibited. Making the very existence of a prohibited transaction—that is, a violation of Section 406—contingent upon the mental state of the fiduciary is wholly inconsistent with making participation in that transaction by the party in interest a violation of the statute. The party in interest's liability would turn not on its own mental state—*i.e.*, whether it knew or should have known that the transaction was one prohibited by ERISA—but on what the *fiduciary* knew or should have known. Indeed, the party in interest may have no way to gauge the state of mind of the fiduciary, and thus be unable to judge whether the contemplated transaction is one prohibited by ERISA.[3]

The question whether Sections 502(a)(3) and (a)(5) authorize a suit against nonfiduciary parties in interest who participate in Section 406 transactions is virtually identical to the question whether Section 502(a) authorizes equitable relief against nonfiduciaries who participate in a fiduciary breach. In *Mertens*, this Court rejected the proposition that nonfiduciaries are liable for knowing participation in a fiduciary breach in the absence of an express provision imposing such a duty, even though such liability was well established under the common law. 508 U.S. at 254. The *Mertens* Court noted only "*some* common law nonfiduciaries are made subject to [a duty not to assist in a fiduciary's breach], namely those who fall within ERISA's artificial definition of fiduciary." 508 U.S. at 255 n.5 (marks and emphasis omitted). As this Court subsequently explained, "[w]hile plaintiffs had a remedy against nonfiduciaries at common law, that was because nonfiduciaries had a duty to the beneficiaries not to assist in the fiduciary's breach. No comparable duty [is] set forth in ERISA." *Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 175 (1994) (marks and internal citations to *Mertens* omitted).[4]

That reasoning applies with equal force to Section 406: there can be no cause of action against nonfiduciary parties in interest for the simple reason that ERISA does not impose a *duty* on such entities. If, as *Mertens* and *Central Bank* indicate, there is no nonfiduciary liability even for knowing

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[3] If, as petitioners argue, a nonfiduciary party in interest could somehow "violate" Section 406, the statute does not indicate what state of mind would be necessary to establish such a violation. In light of ERISA's comprehensive enforcement scheme, this omission is compelling evidence that Congress did not believe nonfiduciary parties in interest could "violate" Section 406.

[4] Dismissing this Court's discussion of nonfiduciary liability in *Mertens* as mere dictum that may be reconsidered in a future case, the United States, as *amicus curiae*, argues that Sections 502(a)(3) and (a)(5) provide a cause of action against nonfiduciaries for knowing participation in a fiduciary breach. (U.S. Br. 24 & n.11.) This Court, however, expressly relied upon its analysis of nonfiduciary liability in *Mertens*—treating it as an established rule of law—in framing what is indisputably the holding of *Central Bank*. 511 U.S. at 175. Indeed, this Court rebuffed the United States' attempt to reargue *Mertens* by turning down the Secretary of Labor's petition for certiorari in *Reich v. Continental Casualty Co.*, 513 U.S. 1152 (1995).

participation in a fiduciary breach, it necessarily follows that there can be no nonfiduciary party-in-interest liability under Section 502(a) for participating in a prohibited transaction. A prohibited transaction under ERISA is no more than a statutorily defined fiduciary breach, and Section 406, like Section 404 (which was at issue in *Mertens*), places the burden of avoiding the fiduciary breach on the fiduciary, where that burden traditionally has fallen.

In an effort to bring nonfiduciaries within the scope of Section 502(a)(3), petitioners and their *amici* also contend that Section 406 generally prohibits *transactions* rather than mere fiduciary *conduct*. That argument is also foreclosed by the reasoning in *Mertens*.[5] A nonfiduciary's participation in a prohibited transaction is no more a "violation" of ERISA Title I than is a nonfiduciary's participation in any other breach of fiduciary duty. In either case, ERISA Title I (and specifically Sections 404 and 406) expressly prohibits the *fiduciary* from engaging in certain conduct, but does not purport to proscribe the conduct of any other party. Since *Mertens* holds that Section 502(a) provides no cause of action against nonfiduciaries (including parties in interest) who knowingly participate in a transaction that amounts to a violation of Section 404 by the fiduciary, it necessarily follows

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5 Petitioners assert that, unlike prohibited transactions under Section 406, there are no "necessary counter-parties" to fiduciary violations under Sections 405 and 409, which were at issue in *Mertens*. (Pet. Br. 46.) But the discussion of nonfiduciary liability in *Mertens* was not contingent upon the presence or absence of "necessary counter-parties" to a fiduciary breach, but rather upon the fact that the plain language of the statute imposed liability on fiduciaries alone. *See Mertens*, 508 U.S. at 253-54 ("no provision explicitly requires [nonfiduciaries] to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty"). Moreover, the fact that a prohibited transaction may occur entirely among fiduciaries contradicts petitioners' assertion that nonfiduciaries are "necessary counter-parties" to Section 406 transactions.

that nonfiduciaries cannot be liable under Title I for participating in a transaction that amounts to a violation—by the *fiduciary* alone—of Section 406.

To be sure, *Mertens* observed in passing that "[p]rofessional service providers * * * must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406," 508 U.S. at 262, but that comment did not express the considered judgment of this Court. Indeed, although the Court (in *Central Bank*) has expressly reaffirmed its observation that nonfiduciaries are not liable for participating in a fiduciary breach, this Court has taken pains since its decision in *Mertens* to make clear that *Mertens* did *not* resolve the party-in-interest issue. As this Court has cautioned, those statements in *Mertens* "were in any event dicta, since Section 406(a) was not at issue." *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 n.3 (1996).[6] Indeed, the most that this Court was willing to say in *Lockheed* for the theory that nonfiduciary parties in interest can be liable under ERISA is that such theory is "not necessarily wrong" (*ibid.*)—not exactly a ringing endorsement. As the Seventh Circuit correctly observed, "not necessarily wrong" is quite a distance from being "right." Pet. App. 11a.

Petitioners suggest that even if the Court does not revisit the central premise of *Mertens* (as reaffirmed in *Central Bank*) that nonfiduciaries are generally not liable for knowing participation in a fiduciary breach, nonfiduciary parties in

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6 In any event, the Court's comments in *Mertens* were made in the context of "[p]rofessional service providers" who "cross the line from advisor to fiduciary." 508 U.S. at 262. Congress imposed fiduciary duties on certain professional service providers—those who provide paid investment advice to a plan, 29 U.S.C. § 1002(21)—but not on other service providers. *See* 29 U.S.C. § 1002(14)(B). Those *fiduciary* parties in interest may be subject to suit under ERISA for disgorgement of assets or profits obtained through a prohibited transaction. 29 U.S.C. § 409(a)

interest should be subject to equitable remedies even if they cannot violate Section 406. They suggest that since Section 502(a)(3) does not expressly limit the persons who may be sued for a violation of Title I, any violation by a *fiduciary* would open the door to a suit in equity under Section 502(a)(3) against "*any* party that would be unjustly enriched by retaining possession of assets." (Pet. Br. 30.) Invoking the common law of trusts, petitioners argue that the Court could impose a constructive trust on plan assets transferred to any third party except a bona fide purchaser — that is, except to a person who gave value for the assets without actual or constructive knowledge of the circumstances giving rise to the constructive trust.

Petitioners' argument proceeds from fundamentally mistaken premises. The mention of "equitable remedies" in Section 502(a)(3) does not, as petitioners assume, incorporate wholesale the common law of trusts into ERISA. This Court has repeatedly emphasized that Section 502(a)(3) does not authorize equitable relief *at large*, but only "appropriate" equitable relief for the limited purpose of "redressing" *violations* or enforcing provisions of Title I. *See Peacock v. Thomas*, 516 U.S. 349, 353 (1996), citing *Mertens*, 508 U.S. at 253. *Cf. Central Bank*, 511 U.S. at 175 (noting that ERISA does not incorporate common law remedies against nonfiduciaries for knowing participation in fiduciary breach). The law does not ordinarily require one to "redress" a wrong for which one bears no legal responsibility. Consistent with this principle, this Court has repeatedly declined to authorize equitable remedies under Section 502(a)(3) against nonfiduciaries who have not directly violated Title I. *See Lockheed Corp.*, 517 U.S. at 888-89; *Peacock*, 516 U.S. at 353; *Mertens*, 508 U.S. at 253.

Moreover, the imposition of a constructive trust on plan assets transferred to a nonfiduciary party in interest in the course of a prohibited transaction would, in effect, make service providers liable regardless of their *actual* knowledge of a prohibited transaction. This Court observed in *Mertens* that "exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advise to ERISA plans, and hence upon ERISA plans themselves." 508 U.S. at 262.

Indeed, imposing liability on nonfiduciary parties in interest without regard to their independent fault would have the undesirable effect of discouraging third parties from providing critical services to pension plans. "[E]xtending the threat of liability over the heads of those who only lend professional services to a plan without exercising any control over, or transacting with, plan assets will deter such individuals from helping fiduciaries navigate the intricate financial and legal thicket of ERISA." *Reich v. Rowe*, 20 F.3d 25, 32 (1st Cir. 1994).

Petitioners dismiss that concern by pointing out that service providers will face liability only if they engage in prohibited transactions, rather than "merely advising" a plan—in other words, only if they accept payment for their services. (Pet. Br. 39 n.21.) That rejoinder, however, does not answer the fundamental problem created by petitioners' interpretation of ERISA—*i.e.*, that fiduciaries will find it difficult to obtain the professional advice that Congress clearly intended they should have in order properly to discharge their duties to the plan, since lawyers, actuaries, and other professional advisors would be subject to suit whenever the Secretary of Labor, a beneficiary or participant, or, as in the case here, a subsequent fiduciary claimed that the provider charged "too much" for their services. In fact, if this case is any indication, professional service providers could be subjected to liability even if the fiduciary, who *knowingly* caused the transaction in the first place, has evaded liability altogether. That result scarcely accords with Congress' focus on the *fiduciary* as the party best situated to ensure against prohibited transactions. Indeed, Congress made clear that fiduciaries may not be relieved from liability for breach of any duty or obligation under Title I of ERISA. *See* 29 U.S.C. § 1110(a).

B. ERISA's Structure and History Establish That Congress Did Not Intend To Authorize Equitable Relief Against Nonfiduciary Parties In Interest.

ERISA's comprehensive, integrated enforcement provisions give the Secretary of the Treasury (through the IRS) exclusive enforcement authority over nonfiduciary parties in interest who engage in Section 406 transactions with respect to tax-qualified pension plans. This enforcement authority was included in Title II of ERISA and codified in Section 4975 of the Internal Revenue Code, 26 U.S.C. § 4975. Enforcement authority with respect to fiduciaries, by contrast, was included in the labor provisions of ERISA's Title I. *See* 29 U.S.C. § 1132.[7] While the Secretary of Labor may assess civil penalties against parties in interest under ERISA § 502(i), 29 U.S.C. § 1102(i), neither the Secretary of Labor nor any private party is authorized to sue nonfiduciary parties in interest for equitable relief under the parallel "catch all" provisions of Section 502(a)(3) or Section 502(a)(5). By attempting to bring the regulation of nonfiduciary parties in interest under the general umbrella of Title I, petitioners ignore the carefully divided enforcement scheme that Congress created.

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[7] The fiduciary focus of Title I of ERISA is confirmed by Congress' decision to prescribe a statute of limitations for fiduciaries, but not for parties in interest. By its terms, ERISA § 413, 29 U.S.C. § 1113, imposes a three-year statute of limitations on actions to redress breaches of fiduciary duty under Title I where the plaintiff had actual knowledge of the violation of Section 406, or at most six years from the date of the last action or omission of the fiduciary that caused the breach, but does not address claims against nonfiduciary parties in interest. If Section 502(a)(3) permits suits against parties in interest, such parties would have an open-ended potential liability, while fiduciaries—to whom the statute assigns the responsibility to prevent prohibited transactions—could escape liability after as little as three years. It is doubtful that Congress would have established such an anomalous structure.

1. Section 4975 of the Internal Revenue Code imposes a two-tiered excise tax on any "disqualified person who participates in [a] prohibited transaction [with a pension plan] (other than a fiduciary acting only as such)," and defines "disqualified person" in terms almost identical to ERISA's definition of "party in interest." *Compare* 26 U.S.C. § 4975(a) and (e)(2) *with* 29 U.S.C. § 1002(14). Under this system, the IRS is authorized to levy an excise tax of 5 percent per year, which is then increased to 100 percent if the prohibited transaction is not corrected. 26 U.S.C. § 4975(a) and (b) (1994). The 100 percent tax levy gives the IRS a powerful incentive to encourage parties in interest to secure a correction of a prohibited transaction, and of course this ultimately benefits plans and participants which receive the correction.

The fact that the IRS may levy excise taxes against certain parties in interest who participate in prohibited transactions does not imply that Section 406 itself imposes a "duty" on nonfiduciaries to avoid such transactions. First, the taxes imposed by Section 4975 of the Internal Revenue Code apply only to "disqualified persons," a term that excludes certain individuals classified as "parties in interest" for purposes of Section 406. Accordingly, the assessment of taxes against disqualified persons under Section 4975 cannot, as petitioners suggest, imply that Section 406 imposes a general duty on all parties in interest to avoid prohibited transactions.

Second, Congress obviously believed that the prospect of incurring a tax penalty would be sufficient to deter nonfiduciary parties in interest from knowingly engaging in prohibited transactions. Congress considered and rejected imposing direct responsibility on nonfiduciary parties in interest for losses sustained by plans, or to pay over to plans any profits they realized on the prohibited transaction. *See infra.* Congress left such liability on fiduciaries who cause the prohibited transactions to occur. 29 U.S.C. § 409(a). In any event, even if the IRS's "right" to impose tax penalties on certain

nonfiduciary parties in interest who engage in prohibited transactions could be said to generate a corresponding "duty" to avoid such transactions, that "duty" would flow only to the IRS rather than to all potential claimants under ERISA § 502.

Third, in light of ERISA's carefully divided enforcement scheme, the inclusion of a tax-based enforcement mechanism in *Title II* of ERISA strongly suggests that a nonfiduciary's participation in Section 406 transactions involving pension plans does not give rise to remedies under *Title I*. *Expressio unius est exclusio alterius* — the expression of one thing is the exclusion of another. *See Leatherman v. Tarrant County Narc. Intell. & Coord. Unit*, 507 U.S. 163, 168 (1993); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

In sum, Congress gave the IRS authority to impose excise taxes on certain nonfiduciary parties in interest with respect to prohibited transactions involving pension plans, and it gave the Secretary and private parties the right to seek certain legal and equitable remedies from fiduciaries who violate Section 406. As this Court observed in *Mertens*, ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 508 U.S. at 254. ERISA is an "enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Id.* at 262. By suggesting that nonfiduciary parties in interest who participate in Section 406 transactions should be subject to equitable remedies under Title I of ERISA, petitioners attempt to conflate the separate, and mutually exclusive, enforcement mechanisms that Congress created.[8]

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[8] Petitioners and their *amici* argue at length that a private cause of action against nonfiduciary parties in interest under Section 502(a)(3) is necessary to effectuate ERISA's remedial pur-

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2. The legislative history of ERISA confirms what is apparent from the plain language of the statute, namely, that Congress only intended for fiduciary breaches to be subject to equitable remedies under Title I. Congress carefully considered, but ultimately rejected, a statutory provision that would have made parties in interest personally liable for losses to a fund resulting from a prohibited transaction. The Senate version of the bill that became ERISA contained an express provision for party-in-interest liability:

> Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.

S. 4, 93d Cong. § 15(h) (1973); *see also* S. 1179, 93d Cong. § 501(d)(17) (1973). The original House bill did not provide for the imposition of any liability against parties in interest, but provided only for fiduciary liability for participation in prohibited transactions. *See* H.R. Conf. Rep. No. 93-1280 (amendment) (1974) ("Conf. Rep."), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075.

The conference resolved the difference between the bills by adopting the present system of divided enforcement. Fiduciary responsibility became the province of ERISA Title I,

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pose. Nevertheless, this Court cautioned in *Mertens* that "vague notions of a statute's 'basic purpose' are [] inadequate to overcome the words of its text regarding the *specific* issue under consideration." 508 U.S. at 261 (emphasis in original); *see also Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) (explaining that no statute pursues a singular purpose at all costs, since legislative compromise means that Congress may seek to further other goals as well).

consistent with the traditional trust law focus on fiduciaries, while parties in interest became the subject of the tax code:

> The conference substitute establishes rules governing the conduct of plan fiduciaries under the labor laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as "parties in interest" under the labor law provisions) with respect to the plan under the tax laws (title II). *This division corresponds to the basic difference in focus of the two departments. The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries. The tax law provisions apply an excise tax on disqualified persons who violate the new prohibited transaction rules* * * *.

Conf. Rep., 1974 U.S.C.C.A.N. at 5076 (emphasis added). Consistent with this division of responsibility, the conference report explains that Title I prohibits only fiduciaries from engaging in certain transactions: "The labor provisions * * * provide general standards of conduct for fiduciaries, and make certain specific transactions 'prohibited transactions' which plan fiduciaries are not to engage in." On the other hand, the report states that "the tax provisions (title II) focus on the disqualified person." *Id. See also id.* at 5100-04.

Upon introducing the Conference Report, Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, confirmed that enforcement of fiduciary duties belongs to the Secretary of Labor (and certain private parties) under ERISA Title I, but that parties in interest not subject to the Section 502(i) civil penalty are solely within the domain of the IRS:

> Under the conference substitute, enforcement of fiduciary provisions would primarily lie with the Secretary of Labor who would be empowered to bring civil actions to redress or restrain violations on the part of fiduciaries. He is also authorized to impose civil penalties on parties in interest who participate in prohibited transactions with

> welfare plans which are not subject to the tax qualification provisions of the Internal Revenue Code. However, the Internal Revenue Service would have responsibility for dealing with those who are "disqualified persons"—similar to parties in interest defined in the labor portion of the conference substitute—with authority to impose excise taxes on violators.

1974 U.S.C.C.A.N. at 5188 (statement of Sen. Williams).

In keeping with that divided enforcement scheme, the conference report makes clear that Title I does not authorize suits seeking equitable relief against parties in interest who participate in prohibited transactions. Conspicuously avoiding any reference to suits against parties in interest, the conference report explains that "civil action[s] may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and *for relief from breach of fiduciary responsibility*." Conf. Rep., 1974 U.S.C.C.A.N. at 5106 (emphasis added). Clearly, Congress never intended to subject parties in interest to suit under Section 502(a)(3).

In the face of this legislative record, petitioners are left to argue that Congress made parties in interest liable for equitable relief under ERISA when it inserted the phrase "other appropriate equitable relief" in the final version of Section 502(a)(3). Petitioners cite no legislative history that even hints that Congress intended for this phrase to incorporate the same civil liability provisions that were contained in the Senate version of the bills and which were rejected by the Conference Report. Indeed, it would make little sense for Congress to have eliminated an express provision that made parties in interest liable for the losses sustained by the plan, as well as to pay over any profits realized from the prohibited transaction, in favor of the enacted language of Section 502(a)(3), which makes absolutely no reference to parties in interest.

In sum, ERISA's legislative history makes clear that Congress did not inadvertently omit party in interest liability

from the comprehensive enforcement scheme set out in Title I of the statute. Instead, Congress deliberately declined to authorize the Secretary of Labor and private parties to pursue monetary remedies against nonfiduciary parties in interest under Title I of ERISA.

C. Petitioners' Textual Arguments Are Meritless, And In Fact Confirm That Nonfiduciary Parties In Interest Are Not Subject To Suit Under Section 502(a)(3).

While ERISA's enforcement scheme, read as a whole, provides compelling support for the proposition that Congress did not intend to make nonfiduciary parties in interest liable under Section 502(a), petitioners and their *amici* draw upon isolated phrases from several ERISA provisions in an effort to bolster their case. There is, however, nothing in the text of ERISA's enforcement provisions that supplies the absent legislative command that nonfiduciary parties in interest are subject to suit under Section 502(a)(3).

Section 502(a)(3). Section 502(a)(3) authorizes participants, beneficiaries, and fiduciaries to seek "appropriate equitable relief" for "any act or practice which violates any provision" of ERISA's Title I. 29 U.S.C. § 1132(a)(3); *see also* ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5) (same for actions by Secretary of Labor). Petitioners and their *amici* contend that, because Section 502(a)(3) does not expressly *limit* the parties who may be sued, it should be read to include parties in interest. That argument, however, misses the point.

This Court has repeatedly emphasized its "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 508 U.S. at 254, quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985). In this regard, *Mertens* observed that the relevant question in this context is not whether ERISA *precludes* certain types of lawsuits, but whether it "affirmatively *authorizes*" such suits. *Mertens*, 508 U.S at 255 n.5 (emphasis in original). As the Seventh Circuit recognized, *Mertens* determined that Congress did not intend to impose civil liability on nonfiduciaries who participate in a breach of fiduciary duty, because ERISA does not contain an explicit statement of nonfiduciary participation liability. "Similarly, nothing in ERISA makes nonfiduciary parties in interest civilly liable to the plan for participating in a § 1106 transaction." Pet. App. 9a. While petitioners strive to establish inferentially that Congress intended to create a cause of action that ERISA never expressly mentions, their efforts cannot be reconciled with this Court's well settled approach to the interpretation of ERISA.

Section 502(i). Section 502(i), 29 U.S.C. § 1132(i), authorizes the Secretary of Labor to assess civil penalties against parties in interest who engage in prohibited transactions with respect to welfare benefit plans.[9] Unlike prohibited transactions involving *pension plans,* which are subject to excise taxes under Section 4975, transactions involving *welfare benefit plans* are generally excluded from regulation by the IRS. *See* 26 U.S.C. § 4975(e)(1). Accordingly, the Secretary of Labor's authority to penalize prohibited transactions involving welfare benefit plans only reinforces the proposition that the IRS has *exclusive* enforcement authority over prohibited transactions involving pension plans. *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it precludes the negative of any other mode").

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[9] It is of no consequence that Section 502(i) makes reference to "a transaction prohibited by Section 406 by a party in interest with respect to a plan to which this part applies." 29 U.S.C. § 1132(i). Given its most natural reading, this language merely identifies the transactions for which the Secretary of Labor may impose civil penalties on parties in interest.

Similarly, the existence of a specific mechanism for assessing penalties against parties in interest under Section 502(i) precludes the recovery of equitable remedies under the "catch-all" language in Section 502(a)(3). As the court of appeals correctly noted, the existence of Section 502(i) which provides for the assessment of civil penalties against a party in interest by the Secretary of Labor, along with Section 502(a)(6), which establishes an express cause of action authorizing the Secretary of Labor to sue to collect those penalties, "makes the absence of a specific provision imposing civil remedies on parties in interest all the more striking." J.A. 350. Petitioners contend that "Congress is not required to enact specific provisions for each civil remedy it creates" (Pet. Br. 24), but this argument again ignores this Court's repeated admonitions that it is unwilling "to infer causes of action in the ERISA context." *Mertens*, 508 U.S. at 254, citing *Russell*, 473 U.S. at 146. As this Court said in *Russell*:

> We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. * * * "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." * * * "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."

473 U.S. at 147 (internal citations omitted). To subject nonfiduciary parties in interest to suits under Section 502(a)(3)—and, by extension, to suits by the Secretary of Labor under Section 502(a)(5)—for restitution would be to upset the carefully divided enforcement scheme that underlies the entire statute.[10]

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[10] There is nothing to the contrary in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), where this Court held that plan-based remedies for fiduciary breaches in Section 502(a)(2) were not intended to foreclose the availability of equitable remedies against fiduciar-

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Section 502(l). Section 502(l)(2)(B), 29 U.S.C. § 1132(l)(2)(B), states that "a fiduciary or other person" may be ordered to pay money "to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of [Section 502]." Contrary to petitioners' argument, this language provides no textual support for the proposition that *nonfiduciary* parties in interest are subject to equitable remedies under Section 502(a)(3), because the language and context of this provision indicate that the phrase "other person" refers only to co-fiduciaries. Not only is Section 502(l) among the enforcement provisions of Title I, which deals generally with the obligations of fiduciaries and co-fiduciaries, but it is expressly entitled "Civil penalties on violations by fiduciaries." Moreover, the plain language of Section 502(l) authorizes civil penalties only with respect to breaches of fiduciary responsibility and "knowing participation in such a breach or violation by any other person," Section 502(l)(1), 29 U.S.C. § 1132(l)(1), and this Court has explained that only co-fiduciaries can be liable for knowing participation in a fiduciary breach. *Mertens*, 508 U.S. at 253-54. Indeed, the

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ies under Section 502(a)(3) for the benefit of plan beneficiaries or participants rather than the plan itself. The *Varity* Court noted that the text of Section 502(a)(3), on its face, was "broad enough to cover individual relief for breach of a fiduciary obligation," 516 U.S. at 510, but there can be no similar argument that Section 502(a)(3) plainly extends to nonfiduciaries. Moreover, while section 502(a)(3) acts as a "safety net" and provides "appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy," *Varity*, 516 U.S. at 512, it does not authorize "appropriate equitable relief *at large*, but only appropriate equitable relief for the purpose of redressing any violations or * * * enforcing any provisions of ERISA or an ERISA plan," *Mertens*, 508 U.S. at 253 (internal marks and alterations omitted) (emphasis in original).

Mertens Court recognized that the term "other person" in Section 502(l) refers solely to co-fiduciaries. *Id.* at 260-61.

Nor does Section 502(l)(4), 29 U.S.C. § 1132(l)(4), provide any textual evidence that nonfiduciary parties in interest are subject to suit under Section 502(a)(3). Section 502(l)(4) provides that the civil penalties that the Secretary may assess against a fiduciary or other person shall be reduced by the amount of any penalty or tax imposed under ERISA § 502(i), 29 U.S.C. § 1102(i), or Section 4975 of the Internal Revenue Code, 26 U.S.C. § 4975. Inasmuch as *fiduciary* parties in interest (not acting solely in their capacity as fiduciaries) may be subject to penalties or taxes under Sections 502(i) and 4975, there is nothing in Section 502(l)(4) that leads inexorably to the conclusion that *nonfiduciary* parties in interest are subject to equitable remedies under Title I.[11]

Section 3003(c). In their attempt to overcome the plain language of Section 406, which expressly imposes obligations on fiduciaries alone, petitioners seize on an isolated phrase in Section 3003(c) of ERISA, which requires the Secretary of Labor to inform the Secretary of the Treasury whenever she "obtains information indicating that a party-in-interest or disqualified person is violating [Section 406]." *See* 29 U.S.C. § 1203(c). Since the statutory terms "party in interest" and "disqualified person" include fiduciaries, *see* 26 U.S.C. § 4975(e)(2)(A), and 29 U.S.C. § 1002(14)(A), nothing in Section 3003(c) compels the conclusion that Section 406 imposes a violable "duty" on *nonfiduciary* parties in interest.

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11 Petitioners erroneously assert that Sections 502(i) and 4975 "explicitly apply to non-fiduciary parties in interest who engage in prohibited transactions." (Pet. Br. 26.) However, the word "non-fiduciary" does not appear in Section 502(i), 29 U.S.C. § 1132(i), and Section 4975 explicitly applies to both fiduciaries and non-fiduciaries, 26 U.S.C. § 4975(e)(2).

Even if that isolated snippet of Section 3003 could overcome the fact that Section 406 by its terms plainly imposes liability only on fiduciaries, plus every structural indication that nonfiduciary parties in interest cannot "violate" Section 406, it would by no means follow that private parties or the Secretary of Labor would have a cause of action against nonfiduciary parties in interest under Section 502(a)(3). As this Court has recognized, the "catch-all" cause of action upon which petitioners rely is not available where the effect would be to circumvent the remedies that Congress expressly provided in ERISA itself. *Varity Corp.*, 516 U.S. at 512. Here, Congress vested the IRS with sole enforcement authority over nonfiduciary parties in interest that participate in prohibited transactions with respect to tax-qualified pension plans, and gave the Department of Labor the authority to assess civil penalties against parties in interest with respect to transactions involving welfare benefit plans.[12] Thus, even if this Court were to find that a nonfiduciary party in interest could somehow "violate" Section 406 by entering into a prohibited transaction with a plan fiduciary, the existence of specific tax penalties under Section 4975, and civil penalties under Section 502(i), would preclude any private cause of action for equitable relief under the "catch-all" provisions of Section 502(a)(3). *See Leatherman*, 507 U.S. at 168.

Indeed, the fact that Section 3003(c) only charges the Secretary of Labor with the obligation to provide notice reinforces the dynamics of ERISA's divided enforcement scheme. If Congress expected the Secretary of Labor to prosecute claims against parties in interest under Section

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12 Petitioners also overlook ERISA § 3003(b), 29 U.S.C. § 1203(b), which expressly recognizes the clear division of enforcement responsibilities between the Secretaries of Labor and the Treasury by requiring them to "consult" and "coordinate" their efforts with respect to enforcement of rules on "prohibited transactions."

502(a)(5) regarding prohibited transactions involving tax qualified pension plans, it undoubtedly would have made the notification duty reciprocal. That it did not indicates that Congress put the authority to pursue parties in interest in those circumstances exclusively in the hands of the Secretary of the Treasury under Title II.

Section 4975(h). Under Section 4975(h) of the Internal Revenue Code, 26 U.S.C. § 4975(h), the Secretary of the Treasury may not assess a tax penalty against a disqualified person who participates in a prohibited transaction without first "notify[ing] the Secretary of Labor and provid[ing] him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax." 26 U.S.C. § 4975(h). Petitioners assert that the only way the Secretary of Labor can "obtain a correction" of a prohibited transaction is through a civil action seeking restitution under Section 502(a)(5). However, nothing in the plain language of Section 4975 requires the conclusion that *nonfiduciary* parties in interest are subject to suit under Section 502. The Secretary may seek to "obtain a correction" of a prohibited transaction by filing a claim under Section 502(a)(5) against the *fiduciary* that caused the plan to enter into a prohibited transaction in violation of Section 406. Indeed, under Section 409, a fiduciary is "personally liable to make good any losses the plan" resulting from the breach of any duties "imposed upon fiduciaries by [Title I of ERISA]." 29 U.S.C. § 1109(a). Section 406, which is part of Title I, imposes duties on fiduciaries not to cause prohibited transactions.

In sum, nothing in the ERISA's enforcement provisions support petitioners' argument that parties in interest may be sued under Section 502(a)(3) for equitable relief.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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